

AF/3632/

JAN 11 2006

TRANSMITTAL OF APPEAL BRIEF (Small Entity)

Docket No.
BCR-10002/29

Re Application Of: Herrmann

Application No.	Filing Date	Examiner	Customer No.	Group Art Unit	Confirmation No.
10/626,041	07/24/2003	R. Ramirez	25006	3632	1247

Invention: SPRAY BOTTLE HANGER

COMMISSIONER FOR PATENTS:

Transmitted herewith ~~in triplicate~~ is the Appeal Brief in this application, with respect to the Notice of Appeal filed on:

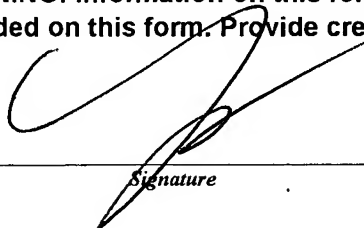
November 7, 2005

☒ Applicant claims small entity status. See 37 CFR 1.27

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- ☒ A check in the amount of the fee is enclosed.
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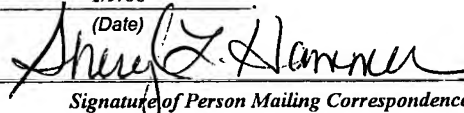
Dated: Jan. 9, 2006

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I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on

1/9/06

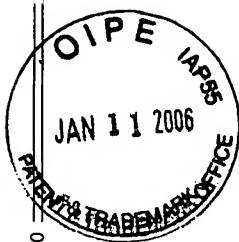
(Date)


Signature of Person Mailing Correspondence

Sheryl L. Hammer

Typed or Printed Name of Person Mailing Correspondence

CC:



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of: Herrmann

Serial No.: 10/626,041

Group No.: 3632

Filed: July 24, 2003

Examiner: R. Ramirez

For: SPRAY BOTTLE HANGER

APPELLANT'S BRIEF UNDER 37 CFR §1.192

Mail Stop Appeal Brief
Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

Dear Sir:

I. Real Party in Interest

The real party and interest in this case is Thomas Herrmann, Applicant and Appellant.

II. Related Appeals and Interferences

There are no appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. Status of Claims

The present application was filed with 5 claims. Claims 2 and 4 were canceled by amendment in September 2004. Claims 6-13 were added by amendment in June 2005. Claims 1, 3 and 5-12 are pending, rejected and under appeal. Claim 13 is allowed. Claims 1, 7 and 10 are the independent claims.

**IV. Status of Amendments Filed Subsequent
Final Rejection**

No after-final amendments have been filed.

V. Summary of Claimed Subject Matter

Independent claim 1 is directed to an article enabling a spray bottle to be suspended from an ironing board or other surface, the spray bottle including a neck portion to which a manually operated spray head attaches. The article comprising a shaped body having a lower end including a continuous ring of material forming an aperture configured for coupling to a neck of a spray bottle; and a side member extending upwardly from the lower end, the side member terminating in a bent upper lip located directly above the aperture for hanging a spray bottle coupled thereto (Specification, page 3, line 13 to page 4, line 3; Figures 1 and 2)

Independent claim 7 is directed to an article enabling a spray bottle to be suspended from an ironing board or other surface, the spray bottle including a neck portion to which a manually operated spray head attaches, the article comprising a molded plastic body having a lower end with an aperture configured for coupling to a neck of a spray bottle; and a side member extending upwardly from the lower end, the side member terminating in a bent upper lip located directly above the aperture for hanging a spray bottle coupled thereto. (Specification, page 3, line 13 to page 4, line 3; Figures 1 and 2)

Independent claim 10 is directed to an article enabling a spray bottle to be suspended from an ironing board or other surface, the spray bottle including a neck portion to which a manually operated spray head attaches, the article comprising a molded plastic body having a lower end with an aperture configured for coupling to a neck of a spray bottle; and a side member extending upwardly from the lower end, the side member including a concave indent terminating in a bent upper lip located directly above the aperture for hanging a spray bottle coupled thereto. (Specification, page 3, line 13 to page 4, line 3; Figures 1-3)

VI. Grounds of Objection/Rejection To Be Reviewed On Appeal

A. The rejection of claims 1 and 5 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,379,578 to Schuler.

B. The rejection of claims 3, 8 and 11 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler in view of U.S. Patent No. 3,794,285 to Barts.

C. The rejection of claims 6, 7, 9, 10 and 12 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler.

VII. Argument

- A. The rejection of claim 1 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,379,578 to Schuler.

Schuler resides in a reusable bottle holder adapted to be used in connection with bottles now commonly used for soft drinks such as the two liter bottles that have a flange like projection at the neck of the bottle. The bottle holder has a locking portion adapted to cooperate with the flange like projection of the bottle in order to provide a secure friction fit for the handle. ('578 Patent Abstract).

Figures 1 and 2 of Schuler are reproduced below. According to the Examiner, "Schuler discloses a device comprising a lower portion including a continuous ring of material defining an aperture, and a side member extending from said lower portion terminating on [sic] a bent lip (18) directly above the aperture capable of hanging a spray bottle coupled thereto."

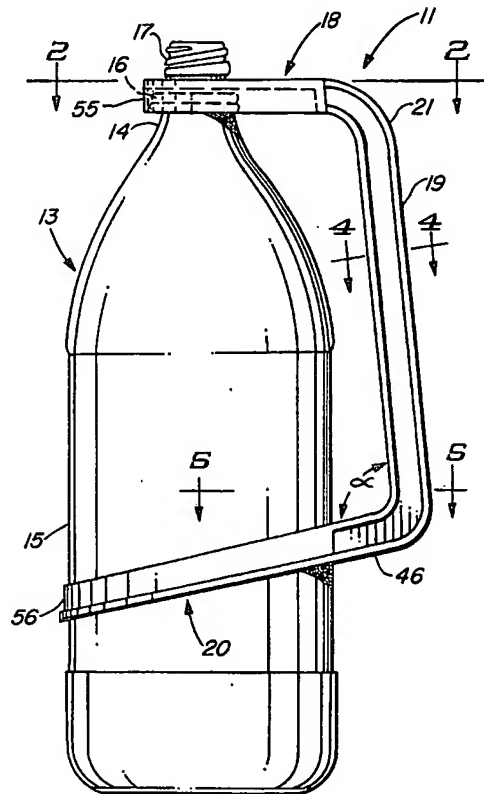


FIG. 1

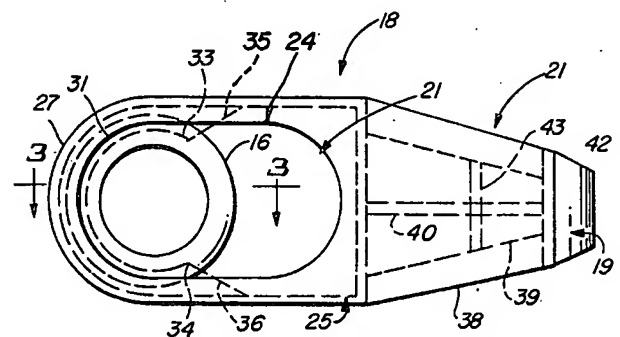


FIG. 2

The Examiner does not refer to which portion of Schuler, if any, constitutes a "lower portion," or which portion constitutes a "side member." Appellant can only assume these are numerical designations 20 and 19, respectively. If so, certainly item 20 is not capable of meeting the limitation of "an aperture configured for coupling to a neck of a spray bottle." Rather, "[b]ody support member 20 has the shape of a cylindrical or tubular section with a cylindrical diameter, i.e. measured at 90.degree. from the longitudinal axis of the cylindrical section, that is approximately the same as the diameter of the body 15 of the bottle 13."

Nor is the Schuler reference capable of meeting the limitation of a "side member terminating in a bent upper lip located directly above the aperture for hanging a spray bottle coupled thereto." In fact, according to Schuler, it is a portion of the *bent upper lip* that is "configured for coupling to a neck of a ... bottle." Thus, "the bent lip (18)" identified by the Examiner is 'used up' during use, such that it is not available to hang anything therefrom, let alone a spray bottle. Accordingly, Schuler does not anticipate, since this may be established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Systems, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). Anticipation requires the presence of all elements of a claimed invention as arranged in the claim, such that a disclosure "that 'almost' meets that standard does not 'anticipate'." Connell v. Sears, Roebuck Co., 722 F.2d 1542, 1548, 220 USPQ 193, 198 (Fed. Cir. 1983).

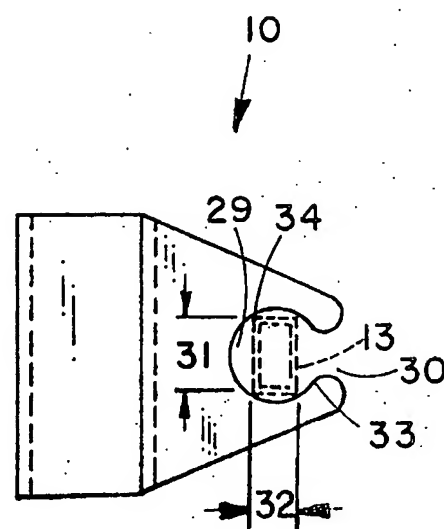
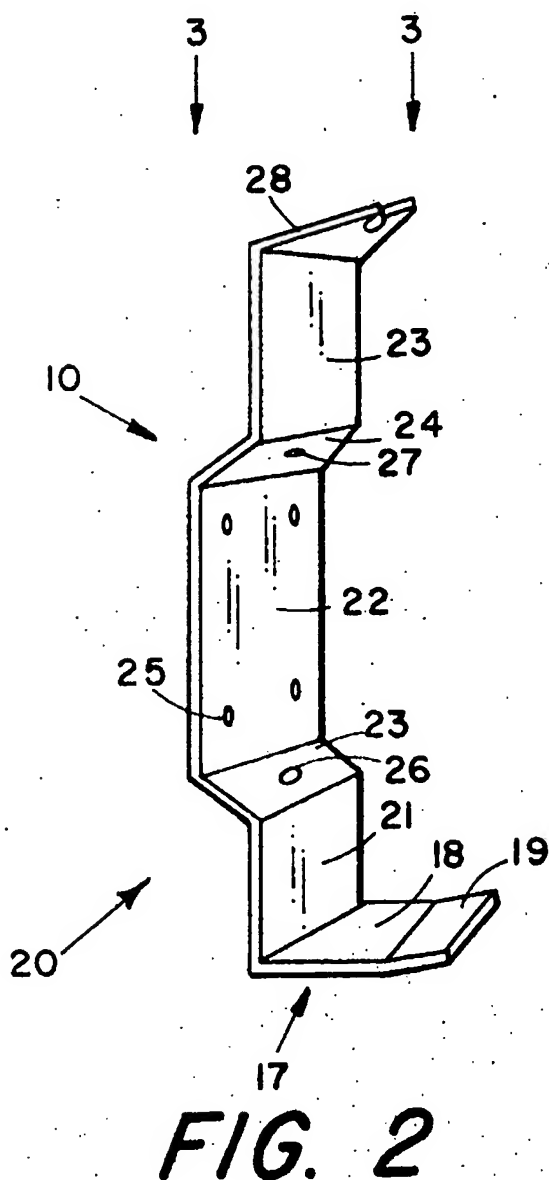
B. The rejection of claim 5 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,379,578 to Schuler.

Claim 5 adds to claim 1 the limitation of "the upper lip include[ing] a surface or feature to enhance friction or holding capability." Nor only is the "bent lip (18)" of Schuler incapable of "hanging a spray bottle coupled thereto," the upper portion of the Schuler article has no "surface or feature to enhance friction or holding capability." The Examiner is entirely silent on this point, and the claim is allowable.

C. The rejection of claims 3, 8 and 11 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler in view of U.S. Patent No. 3,794,285 to Barts.

Claims 3, 8 and 11 include the limitation of "the side member includ[ing] a concave indent." The Examiner argues that Barts discloses "a curved back surface, and that "[i]t would have been obvious ... to have provided the holder shown by Schuler with a curved back as shown by Barts for a variety of reasons; for example, reinforcing, aesthetics, etc." The Examiner is wrong on both counts.

First, Appellant is claiming a "concave indent" and not a curved back surface. Second, the back surface of Barts is not concave. The Figure referenced by the Examiner is shown below:



The Examiner contends that, "for example," item 23 meets this limitation. It does not. Item 23

is simply "a wall that diverges from a vertical wall." Finally, the Examiner's purported motivation to combine, namely, "reinforcing, aesthetics, etc." does not meet the standard required for establishing *prima facie* obviousness. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990).

In this case, Schuler neither teaches nor suggests the desirability of a curved back for reinforcing or aesthetics. Indeed, with respect to reinforcing, Schuler already *has* a solution, namely, the use of an I-beam: "As shown in FIG. 4, the handle portion 19 has an I beam cross section with the central rib 40, and an exterior cross member 42 and an interior cross member 43. Desirably the exterior cross member 42 is of slightly larger width than the interior cross member 43 in order to provide a more comfortable grip. The I beam cross section is provided for structural integrity and rigidity." ('578 Patent, col. 3, lines 15-22). Thus, Schuler teaches away from the use of "a curved back" for such a purpose. With regard to "aesthetics," such a concept is simply too speculative to apply. To what "aesthetics" is the Examiner referring, and where is the requisite motivation to combine?

D. The rejection of claim 6 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler.

Claim 6 adds to claim 1 the limitation of "wherein the shaped body is made of molded plastic." The Examiner dismisses this limitation on the grounds that "[t]he material from which a device is made is considered as a matter of engineering choice having no patentable significance." The undersigned has reviewed the MPEP and the case law on this proposition, and cannot find the authority upon which the Examiner is relying. Depending upon the circumstances, obviousness may be found through aesthetic design changes, elimination of a step or element, automating a manual activity, changes in size, shape, or sequence of adding ingredients, and so forth, but nowhere can the undersigned find the blanket mandate that "[t]he material from which a device is made is considered as a matter of engineering choice having no patentable significance." It is true, however, that to establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385, 165

USPQ 494, 496 (CCPA 1970). That did not happen with respect to this claim.

E. The rejection of claim 7 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler.

Claim 7 stands rejected under 35 U.S.C. §103(a) over Schuler on the grounds that “[t]he material from which a device is made is considered as a matter of engineering choice having no patentable significance.” But claim 7 is an independent claim with multiple limitations. The recitation of “molded plastic” is just a part of the claim. This claim has not been examined and none of the limitations have been found in the prior art, alone or in combination. Accordingly, *prima facie* obviousness has not been established.

F. The rejection of claim 9 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler.

Claim 9 stands rejected under 35 U.S.C. §103(a) over Schuler on the grounds that “[t]he material from which a device is made is considered as a matter of engineering choice having no patentable significance.” But claim 9 adds to claim 7 the limitation of an “upper lip include[ing] a surface or feature to enhance friction or holding capability.” The recitation of “molded plastic” is not even a part of this claim, but rather is set forth in independent claim 7. It appears that this claim has not been examined, and none of the limitations have been found in the prior art, alone or in combination. Accordingly, *prima facie* obviousness has not been established.

G. The rejection of claim 12 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler.

Claim 10 stands rejected under 35 U.S.C. §103(a) over Schuler on the grounds that “[t]he material from which a device is made is considered as a matter of engineering choice having no patentable significance.” But claim 10 is an independent claim with multiple limitations. The recitation of “molded plastic” is just a part of the claim. This claim has not been examined and none of the limitations have been found in the prior art, alone or in combination. Accordingly, *prima facie* obviousness has not been established.

H. The rejection of claim 10 under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,379,578 to Schuler.

Claim 12 stands rejected under 35 U.S.C. §103(a) over Schuler on the grounds that “[t]he material from which a device is made is considered as a matter of engineering choice having no patentable significance.” But claim 12 adds to claim 10 the limitation of an “upper lip include[ing] a surface or feature to enhance friction or holding capability. The recitation of “molded plastic” is not even a part of this claim, but rather is set forth in independent claim 7. It appears that this claim has not been examined, and none of the limitations have been found in the prior art, alone or in combination. Accordingly, *prima facie* obviousness has not been established.

Conclusion

In conclusion, for the arguments of record and the reasons set forth above, all pending claims of the subject application continue to be in condition for allowance and Appellant seeks the Board’s concurrence at this time.

Date: Jan. 9, 2006

Respectfully submitted,

By: _____

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APPENDIX A**CLAIMS ON APPEAL**

1. An article enabling a spray bottle to be suspended from an ironing board or other surface, the spray bottle including a neck portion to which a manually operated spray head attaches, the article comprising:

a shaped body having a lower end including a continuous ring of material forming an aperture configured for coupling to a neck of a spray bottle; and

a side member extending upwardly from the lower end, the side member terminating in a bent upper lip located directly above the aperture for hanging a spray bottle coupled thereto.

3. The article of claim 1, wherein the side member includes a concave indent.

5. The article of claim 1, wherein the upper lip includes a surface or feature to enhance friction or holding capability.

6. The article of claim 1, wherein the shaped body is made of molded plastic.

7. An article enabling a spray bottle to be suspended from an ironing board or other surface, the spray bottle including a neck portion to which a manually operated spray head attaches, the article comprising:

a molded plastic body having a lower end with an aperture configured for coupling to a neck of a spray bottle; and

a side member extending upwardly from the lower end, the side member terminating in a bent upper lip located directly above the aperture for hanging a spray bottle coupled thereto.

8. The article of claim 7, wherein the side member includes a concave indent.

9. The article of claim 7, wherein the upper lip includes a surface or feature to enhance friction or holding capability.

10. An article enabling a spray bottle to be suspended from an ironing board or other surface, the spray bottle including a neck portion to which a manually operated spray head attaches, the article comprising:

a molded plastic body having a lower end with an aperture configured for coupling to a neck of a spray bottle; and

a side member extending upwardly from the lower end, the side member including a concave indent terminating in a bent upper lip located directly above the aperture for hanging a spray bottle coupled thereto.

11. The article of claim 10, wherein the side member includes a concave indent.

12. The article of claim 10, wherein the upper lip includes a surface or feature to enhance friction or holding capability.

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None.

APPENDIX B

EVIDENCE

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APPENDIX C
RELATED PROCEEDINGS

None.